

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

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P/S*

75-1195

To be argued by
EDWARD J. LEVITT

United States Court of Appeals FOR THE SECOND CIRCUIT Docket No. 75-1195

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES BROWN, a/k/a JAMES FEDERICO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Southern District of New York,
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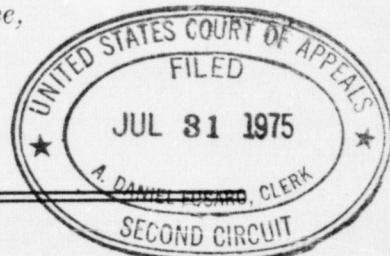




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**United States Court of Appeals
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BRIEF FOR THE UNITED STATES OF AMERICA

—————
Preliminary Statement

James Brown, a/k/a James Federico, appeals from a judgment of conviction entered April 18, 1975, in the United States District Court for the Southern District of New York, following Brown's plea of guilty before the Honorable Milton Pollack, United States District Judge.

Indictment 74 Cr. 867, filed September 12, 1974, charged Brown and co-defendants James J. Philips, Fredrick G. Horwitz and Marvin Stoff in ten counts with passing, dealing in, and possessing counterfeit United States obligations in violation of Title 18, United States Code, Sections 472, 473 and 474, and conspiracy to do so in violation of Title 18, United States Code, Section 371.

Brown's trial commenced on February 18, 1975 and ended on February 25, 1975 when the jury returned deadlocked.* A new trial was ordered.

* Philips, Horwitz and Stoff had previously entered pleas of guilty to the indictment.

On March 4, 1975, Brown withdrew his plea of not guilty and entered a plea of guilty to Count One.

On April 18, 1975, Brown was sentenced by Judge Pollack to three years imprisonment and a \$2,500 committed fine.

Brown is at liberty on bail pending this appeal.

ARGUMENT

The District Court properly denied Brown's motion to dismiss the indictment.

Just before trial commenced on February 18, 1975, Brown, relying on the District Court's opinion in *United States v. Crispino*, 392 F. Supp. 764 (S.D.N.Y.), *rev'd*, Dkt. No. 75-1130 (2d Cir., June 30, 1975), moved to dismiss the indictment on the ground that Special Attorney Levitt of the Strike Force, who had presented Brown's case to the Grand Jury, had not been lawfully authorized to do so. It was stipulated that Mr. Levitt's letter of authorization was identical to the letter of authorization of Mr. Padgett, the Special Attorney in *Crispino*. The motion was denied by Judge Pollack by order with opinion filed February 25, 1975 (A6-A18).*

On appeal, Brown renews his argument that the indictment should have been dismissed because, he claims, the Strike Force attorney was not properly authorized to appear before the Grand Jury. This contention is without merit.

First, Brown's guilty plea forecloses him from raising this issue on appeal since "[a] plea of guilty to an indict-

* Page references preceded by "A" refer to appellant's appendix.

ment is an admission of guilt and a waiver of all non-jurisdictional defects", *United States v. Spada*, 331 F.2d 995, 996 (2d Cir.), cert. denied, 379 U.S. 865 (1964), and the "effect of a plea of guilty does not depend on whether an issue sought to be raised on appeal . . . was in fact properly raised in advance of trial", *United States v. Doyle*, 348 F.2d 715, 718 (2d Cir.), cert. denied, 382 U.S. 843 (1965).* The presence of a Special Attorney for the Strike Force in the Grand Jury, if indeed improperly authorized by the Attorney General, would clearly create no more than a non-jurisdictional defect in the "institution of the prosecution or in the indictment", Rule 12(b)(2) of the Federal Rules of Criminal Procedure, *United States v. Tavoularis*, Dkt. No. 75-1027 (2d Cir., May 6, 1975), slip op. at 3459-3460 n. 20; *United States v. Crispino*, *supra*, 392 F. Supp. at 783, 8 Moore's Federal Practice ¶ 12.03[3] (2d ed. 1975), waived by the guilty plea.

Furthermore, Brown's argument is foreclosed on the merits by this Court's decisions in *In re Grand Jury Subpoena of Alphonse Persico*, Dkt. No. 75-2030 (2d Cir., June 19, 1975), and in *United States v. Crispino*, *supra*, and *United States v. Eliano*, Dkt. No. 75-1035 (2d Cir., July 28, 1975), which adopt the *Persico* decision as controlling authority.

* The only exception to this rule is that "an appeal would lie on an issue not going to guilt when there had been '[a] plea expressly reserving the point accepted by the Court with the Government's consent.'" *United States v. Burke*, Dkt. No. 75-1021 (2d Cir., May 15, 1975), quoting *United States v. Doyle*, *supra*, 348 F.2d at 719; *United States v. Faruolo*, 506 F.2d 490, 491 n. 2 (2d Cir. 1974). However, the exception is not applicable in this case since Brown made no attempt to reserve the Special Attorney authorization issue for appellate purposes. (See minutes of Brown's guilty plea at A-23 through A-27). *United States v. Selby*, 476 F.2d 965 (2d Cir. 1973); *United States v. Mann*, 451 F.2d 347 (2d Cir. 1971).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

EDWARD J. LEVITT,
*Special Attorney,
United States Department of Justice,*

JOHN D. GORDAN, III,
*Assistant United States Attorney,
Of Counsel.*

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Edward J. Levitt,

deposes and says that he is employed in the office of
the Joint Strike Force for the Southern District of New
York.

That on the 31st day of July, 1975
he served a copy of the within brief
by placing the same in a properly postpaid franked
enveloped addressed:

James F. Mc Ardle, Esq.
123-60 83rd Avenue
Kew Gardens, New York 11415

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Edward J. Levitt

Sworn to before me this

31st day of July, 1975.

Carl M. Bornstein

CARL M. BORNSTEIN
Notary Public, State of New York
No. 31-0359368
Qualified in New York County
Commission Expires March 30, 1977